NUMBER 83-1346

United States Supreme Court

OCTOBER TERM, 1983

POLEATE BAHAM, JR.
IRVEN COUSIN, AND
JACQUELINE CARR

VERSUS

HON. DAVID C. TREEN, GOVERNOR,
STATE OF LOUISIANA
HON. WILLIAM FRENCH SMITH, ATTORNEY GENERAL
OF THE UNITED STATES
HON. WILLIAM J. GUSTE, JR., ATTORNEY GENERAL,
STATE OF LOUISIANA
HON. BRUCE E. UNANGST, PRESIDENT
ST. TAMMANY PARISH COUNCIL
HON. W.A. "PETE" FITZMORRIS, CHAIRMAN
ST. TAMMANY PARISH COUNCIL
HON. JAMES H. BROWN, SECRETARY OF STATE,
STATE OF LOUISIANA
HON. JERRY FOWLER, COMMISSIONER OF ELECTIONS,
STATE OF LOUISIANA
HON. LUCY REID RAUSCH, CLERK OF COURT,
PARISH OF ST. TAMMANY,
22ND JUDICIAL DISTRICT COURT

Motion to Dismiss on Direct Appeal from the United States District Court for the Middle District of Louisiana

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: *Page*

OTHER:

POLEATE BAHAM, ET AL

VERSUS UNITED STATES SUPREME COURT

DAVID C. TREEN, ET AL. NUMBER 83-1346

* * * * *

**MOTION TO DISMISS
ON BEHALF OF STATE DEFENDANTS–
APPELLEES**

NOW INTO COURT, through undersigned counsel come Governor David C. Treen, Attorney General William J. Guste, Jr., Secretary of State James H. Brown, and Commissioner of Elections Jerry Fowler, State defendants-appellees, who, in response to the appellants' jurisdictional statement, move this Honorable Court to dismiss the appellants' appeal on the following grounds:

I.

The appeal is not within this Court's jurisdiction.

II.

The substantive issue before this Court is moot.

WHEREFORE, the State defendants-appellees pray that, for the above cited reasons, the plaintiffs-appellees' appeal be dismissed.

Respectfully submitted,
WILLIAM J. GUSTE, JR.
Attorney General

BY: _____
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POLEATE BAHAM, ET AL

VERSUS NUMBER 83-1346

DAVID C. TREEN, ET AL

* * * * *

FACTS IN SUPPORT OF THE STATE DEFENDANTS-APPELLEES' MOTION TO DISMISS

On July 25, 1983, qualifying began for those wishing to become candidates in the October 22, 1983, Louisiana elections. Among those to be elected were the members of the St. Tammany Parish governing authority.

"Qualifying" is a statutory term, set forth in L.S.A. R.S. 18:461, requiring that:

> A person who desires to become a candidate in a primary election shall qualify as a candidate by timely filing notice of his candidacy, which shall be accompanied either by a nominating petition or by the qualifying fee and any additional fee imposed.

The candidates in St. Tammany Parish were authorized to qualify before either the parish clerk of court, defendant-appellee Lucy Reid Raush, or with the president or secretary of the St. Tammany Parish Board of Election Supervisors. [L.S.A. R.S. 18:462]. Qualifying ended, in accordance with L.S.A. R.S. 18:468, at 5:00 p.m. on July 29, 1983.

Notices of candidacy from St. Tammany Parish designated the parish council as the office sought.

Prior to qualifying week St. Tammany Parish had made two submissions to the United States Attorney General, pursuant to Section 5 of the 1965 Voting Rights Act, as amended. The initial submission related to a

change in the form of government for the parish. The parish governing authority was, at that time, operating under a charter. The governing body was designated a council. The parish had voted however, to return to a "police jury" form of government.

On the basis of Section 5 of the 1965 Voting Rights Act, as amended, any change in the structure of a governing body is subject to preclearance requirements. Absent preclearance, any such change is unenforceable. [*Herron v. Koch*, 523 F.Supp. 167 (D.C. N.Y., 1981)]. In reality, St. Tammany Parish's proposed conversion from a councilmanic form of government to a police jury structure was approved May 31, 1983. Unfortunately, general knowledge of this preclearance did not come to light until after the close of qualifying. The reason for this bureaucratic mix-up has yet to be fully explained. Even so, the second of the parish's submissions was not precleared until August 1, 1983. This submission consisted of the St. Tammany Parish reapportionment plan. [Appellants' exhibits A28, A38].

On July 25, 1983, the Clerk of the court in St. Tammany Parish began accepting the candidates' qualifying papers. As the facts *then* appeared, the United States Attorney General had not approved either the conversion in the form of government or the reapportionment. Candidates were unsure how to qualify. The clerk was unsure for which offices and which districts qualifying papers should be accepted.

At the request of the Assistant District Attorney from St. Tammany Parish, Attorney General's Opinion No. 83-633 was issued. That opinion advised that without

preclearance, candidates *should* qualify for the then existing council form of government in the then existing districts. Absent preclearance, the changes were not yet effective. Even so, the opinion specifically noted that:

> . . . the clerk of court operates in a ministerial capacity in accepting qualifying papers. Therefore, even though the police jury plan of government is not yet in effect, the clerk should accept a candidate's qualifying papers for either position (i.e. councilman or police juror). (See R.S. 18:461 and 18:462). [Appellants' exhibit A30].

Therefore, candidates *were not precluded* from qualifying under the new plan of government. They were simply advised that, under federal law, the plan was technically not yet in effect. Candidates then changed their qualifying papers in an effort to comply with the law.

By August 1, 1983, by the actions of the United States Department of Justice in granting the necessary preclearance, St. Tammany Parish's council form of government had become replaced by a policy jury system. St. Tammany Parish's former district lines had been replaced by a new reapportionment. Elections were coming up in less than three months. Candidates were, in essence, qualified for offices that did not exist in districts that did not exist.

Pursuant to R.S. 18:470 the clerk of court was required to certify the candidates to the Secretary of State. Several of the candidates then filed suit against the Secretary of State seeking to be recertified as police juror candidates instead of council candidates. [Sharp v. Brown, Docket #269,284, 19th Judicial District Court, Parish of East Baton Rouge, State of Louisiana].

By ordering the recertification of the candidates the court was, in effect, interpreting law, not creating a new election procedure. The Louisiana Supreme Court had previously ruled in *Roe v. Picou*, 361 So.2d 874 (LA 1978), that where confusion exists as to a candidate's proper designation, a candidate could qualify as a councilman and later convert to a police jury candidate.

There was, in addition, no authority for the district court to reopen the qualifying period. As was stated above, qualifying is statutorily set. The qualifying period may only be reopened, in accordance with L.S.A. R.S. 18:469, if a candidate in the primary election dies or the number of candidates who have qualified is fewer than the number of offices available.

There is no authorization in state law for the Secretary of State to print names on the ballot for offices that do not exist. On August 17, 1983, the trial court in *Sharp*, supra, merely implemented the preclearances of the United States Department of Justice.

Significantly, the trial court in *Sharp*, supra, expressly stated that the recertification judgment would not be res judicata to any of the recertified candidates who had not actually been made parties thereto. Therefore, at anytime any of those candidates, including Jacqueline Carr, could have gone to court and asked to be placed in a different district or any candidate could have, within statutory time limits withdrawn from the race. No such action was taken by any candidate.

Instead, Appellant Carr sought to enjoin the election. The state courts denied this relief.

In September of 1983, the appellants herein filed suit

in the United States District Court for the Middle District of Louisiana. The plaintiffs therein sought a temporary restraining order to block the October 22, 1983, elections in St. Tammany Parish. This request was denied on October 12, 1983. On October 18, 1983, a three-judge court denied the plaintiffs' request for a preliminary injunction. The election then proceeded as scheduled.

The plaintiffs had requested a three-judge court, alleging that the election must be enjoined because the recertification of candidates required submission under the 1965 Voting Rights Act, as amended. However, prior to a hearing on the merits of the plaintiffs' case, St. Tammany Parish voluntarily submitted for preclearance the recertification of candidates to the United States Attorney General. The three-judge court in Baham v. Treen expressed no opinion on the merits of the suit but instead, in denying the plaintiffs' injunction, stated that if a submission of the recertification was made prior to a hearing on the merits and preclearance was granted, then:

> . . . *the substantive question before the Court will be moot.* Such submission, if it occurs, shall be completely without prejudice to the claims of defendants or the motion that submission was not required by law. [Appellants' exhibit A-3, A-4]

On October 28, 1983, the United States Attorney General precleared the recertification procedure in question [Appellants' exhibit A-40]. The District Court then, in accordance with its order of October 18, 1983, cancelled the scheduled hearing on the merits.

ARGUMENTS OF LAW

The United States Supreme Court lacks jurisdiction

over this appeal. Any such appeal should properly be before the Fifth Circuit Court of Appeal. The issue in the plaintiffs' suit in Baham v. Treen revolved entirely around the recertification of candidates in St. Tammany Parish. Their request for a three-judge court was based on their allegation that the recertification was supposed to be submitted for preclearance pursuant to Section 5 of the 1965 Voting Rights Act, as amended.

The authority of the three-judge court may extend only to enjoin a change in voting practices or procedures which, though subject to submission, had not been precleared. [See *Morris v. Gressette*, 432 U.S. 491, 97 S.Ct. 2411, 53 L.Ed. 2d 506 (1977); *Allen v. State Board of Elections*, 393 U.S. 544, 89 S.Ct. 817, 22 L.Ed. 1(1969).] In *Allen*, 89 S.Ct. 817, 829 the court stated with reference to the convening of a three-judge court:

> First, of course, the State may institute a declaratory judgment action. *Second, an individual may bring a suit for declaratory judgment and injunctive relief, claiming that a state requirement is covered by 5, but has not been subjected to the required federal scrutiny.* Third, the Attorney General may bring an injunctive action to prohibit the enforcement of a new regulation because of the State's failure to obtain approval under S5. (Emphasis Supplied)

The only issue before the Court in Baham v. Treen was submission of the recertification procedure. The matter was rendered moot in accordance with the District Court's order of October 18, and 31, 1983. As was cited above, the substantive issue became moot on Oc-

tober 28, 1983, when preclearance was obtained. [Appellants' exhibit A40].

On the basis of the decision in *Ward v. Dearman*, 626 F.2d 489, 491 (5th Cir. 1980), any appeal of this issue should be to the Fifth Circuit Court of Appeal, not the United States Supreme Court. The Court in *Ward*, stated:

> When, however, a three-judge court dismisses a case as moot, the appeal is to the court of appeals rather than to the Supreme Court.
> . . . the Court is moving toward the position that a direct appeal will lie to it only when a three-judge court finds a substantial federal question, proceeds to decide it, and grants or denies an injunction.

For the above cited reasons, any appeal of the issue raised in Baham v. Treen should be directed first to the Fifth Circuit Court of Appeal. It is submitted that the State defendants-appellees' motion to dismiss should, therefore, be granted.

Respectfully submitted,

WILLIAM J. GUSTE, JR.
Attorney General

BY: _____

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Chief, Civil Division

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that three copies of the foregoing Motion to Dismiss on Behalf of State Defendants have been served upon all parties named herein, by service upon counsel of record representing said parties, by depositing said documents in the United States Mail, first class postage prepaid to: James R. Jenkins, Assistant District Attorney 501 E. Boston Street, Covington, LA; Jacqueline Carr, Attorney at Law, White Kitchen Square, P.O. Box 550, Slidell, LA 70459; Shelly Zwick, Assistant U.S. Attorney, 352 Florida Blvd., Baton Rouge, LA; Tom Derveloy, Attorney at Law, 202 Columbia St., Covington, LA; this ____day of April, 1984.

CHARLES L. PATIN, JR.

B-7947, 100, 4-84